No. 13892

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN ALAN TOMLINSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney;

MANLEY J. BOWLER,
Assistant United States Attorney,
Chief of Criminal Division;

MANUEL L. REAL,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,

Attorneys for United States of America,
Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-0171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on September 4, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [I,[1] pp. 2-3.]

On October 6, 1952 the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on November 17, 1952.

On January 6, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable William C. Mathes, without a

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[1]"I" refers to Transcript of Record, Vol. I.

jury, and on March 30, 1953, the appellant was found guilty as charged in the indictment. [I, p. 38.]

On April 6, 1953, the appellant was sentenced to imprisonment for a period of four years and judgment was also entered. [I, p. 41.] Appellant appeals from this judgment. [I, pp. 44-45.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This court has jurisdiction under Section 1291 of Title 18, United States Code.

II.
STATUTES INVOLVED.

The indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The indictment charges as follows:

> "Indictment—No. 22461-CD Criminal [U. S. C., Title 50, App., Sec. 462—Selective Service Act, 1948].
>
> "The Grand Jury charges:
>
> "Defendant John Alan Tomlinson, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 82, said board being then and there duly created and acting under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 18, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place on or about July 21, 1952, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [I, pp. 2-3.]

On October 6, 1952, appellant appeared for arraignment and plea, represented by Harold Shire, Esq., before the Honorable William C. Mathes, United States District

Judge, and entered a plea of Not Guilty to the offense charged in the indictment.

On January 6, 1953, the case was called for trial before the Honorable William C. Mathes, without a jury, and Harold Shire, Esq., represented the defendant-appellant. On March 30, 1953, Appellant was found guilty as charged in the indictment. [I, p. 38.]

On April 6, 1953, the appellant was sentenced to imprisonment for a period of four years in a penitentiary. [I, p. 41.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The district court erred in failing to grant the Motion for judgment of acquittal duly made at the close of all the evidence. [App. Spec. of Error 1; App. Br. p. 13.][2]

B. The district court erred in convicting the appellant and entering a judgment of guilt against him. [App. Spec. of Error 2; App. Br. p. 13.]

C. The district court erred in denying the motion for new trial. [App. Spec. of Error 3; App. Br. p. 14.]

D. The district court committed reversible error in refusing the appellant the right to use the secret F.B.I. investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the hearing officer of the Department of Justice was fair and adequate as

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Errors"; "App. Br." refers to "Appellant's Brief."

required by due process of law, the Act and regulations. [App. Spec. of Error 4; App. Br. p. 14.]

E. The district court committed reversible error in refusing appellant the right to testify about how he had been denied a full and fair hearing upon personal appearance by the local board. [App. Spec. of Error 5; App. Br. p. 14.]

IV.

STATEMENT OF THE FACTS.

On October 18, 1949, John Alan Tomlinson registered under the Selective Service System with Local Board No. 116, Los Angeles, California. He was eighteen years of age at the time, having been born on August 13, 1931. He gave his occupation as "baker" and indicated he was employed at the Walter Bowie Pie Company in Los Angeles, California. [F. 1.][3]

On September 11, 1950, the appellant filed with Local Board No. 82, SSS Form 100, Classification Questionnaire. [F. 4-11.]

In Series VI of the Questionnaire he stated that he was a minister of religion, and that he served regularly as a minister of Jehovah's Witnesses. [F. 6.] He stated that he was a "baker" and had worked with his present employer for three years, and expected to continue indefinitely at the trade. [F. 7.] He stated that he worked

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[3]Numbers preceded by "F" appearing herein within brackets refer to pages of Appellant's draft board file, Government's Exhibit 1, a file of photostatic copies of papers filed in the cover sheet of Appellant's draft board file. At the bottom of each page thereof appears an encircled handwritten number which identified the pages in the draft board file.

an average of 40 hours per week and was paid at the rate of $1.55 per hour. [F. 8.] The appellant signed Series XIV of that Questionnaire, and thus, informed Local Board No. 116 that he claimed exemption from military service by reason of conscientious objection to participation in war. He also requested further information and forms. [F. 10.]

SSS Form 150, Special Form for Conscientious Objectors was furnished to the appellant and he completed this form and filed it with the Local Board No. 116 on September 18, 1950. The appellant claimed to be conscientiously opposed to participation in war in any form, by reason of his religious training and belief. [F. 20-23.]

On October 5, 1950, the appellant was classified in Class I-A, and was mailed SSS Form 110, Notice of Classification, on October 6, 1950.

On October 9, 1950, the appellant requested a personal appearance before the Board and was granted such personal appearance on November 17, 1950. [F. 34-35.]

On November 30, 1950, the appellant filed Notice of Appeal from his classification. [F. 36.] On January 10, 1951, the applicant filed affidavit of dependency claiming entitlement of deferment and to be placed in Class III-A, registrant with child or children and registrant deferred by reason of extreme hardship and privation to dependents. [F. 49-50.] The notice of rejection of the claim and decision not to reopen the classification was mailed to the appellant. [F. 51.]

On April 30, 1952, the appellant was classified in Class I-A-O and notice thereof was mailed to appellant on May 7, 1952. [F. 11.]

On July 1, 1952, SSS Form 252, Order to Report for Induction, was mailed to the appellant ordering him to report for induction on July 18, 1952. [F. 68.] The appellant reported for induction but refused to submit to induction into the armed forces of the United States. [F. 85.]

V.

ARGUMENT.

POINT ONE.

The Board of Appeals Had Basis in Fact to Classify the Appellant in Class 1-A-O and Its Action Was Neither Arbitrary nor Capricious.

The Statute granting the exemption reads as follows:

Title 50, App., United States Code, Section 456, Deferments and exemptions from training and service.

> "(j) Nothing contained in this title shall be construed to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . ."

It is necessary, however, for a person who claims exemption from combatant, or non-combatant training, to have his claim sustained by his local, or thereafter his appeal board.

Thus, such a registrant must satisfy the Selective Service Board as to the validity of his claim for exemption in the following particulars:

(1) He must be conscientiously opposed to war in any form;

(2) This opposition must be by reason of the registrant's religious belief, and

(3) His religious training;

(4) In addition the character of the registrant, and

(5) The good faith and sincerity of his objections are judged.

If the registrant, or his claim for exemption, fails to satisfy the Selective Service Board in any one of the following particulars, there is a basis in fact for the classification of the Board in refusing the exemption, in whole or in part.

(1) Conscientious Objection to War in Any Form.

Preparedness for war and protection of our country is self defense. A person who says that he will defend himself, or his family, or his possessions, or his church but not his country—is merely setting his own standards of what is right and what should be defended. The law does not allow him to make such a choice and still claim exemption from Military Service. He is not opposed to war in any form; this in itself constitutes a basis-in-fact to sustain the classification of a Selective Service Board.

United States v. Dal Santo, 205 F. 2d 429.

It may be that the sincerity of this group of claimants for exemption, or some of them, can not be questioned. Yet, Congress has seen fit to grant the conscientious objection exemption only to those who are opposed to war in any form.

(2) Religious Belief.

Religious training and belief is defined in the statute as follows:

> ". . . Religious training and belief in this connection means an individual's belief in relation to a

> Supreme Being involving duties superior to those arising from any one religion, but does not include essentially political, sociological or philosophical views or of merely personal moral code . . ."
>
> 50 U. S. C., Sec. 456(j), as amended June 19, 1951, c. 144, Title I, Sec. 1(1-q), 65 Stat. 83.

Thus, a conscientious objection on political, moral or humanitarian grounds, sincere though it may be, does not qualify a registrant for the exemption.

Although a personal belief is a subjective matter, it is manifested by objective evidence. A registrant is able to state what these objective manifestations of his belief are in the special conscientious objection form (Selective Service Regulation 1621.11). The registrant is further able to submit any additional information to substantiate his claim.

United States v. Nugent, 346 U. S. 1.

If the Form 150, or other evidence submitted by the registrant is incomplete in any respect, this would be a basis in fact for a classification refusing the exemption in whole or in part.

Linan v. United States, 202 F. 2d 693 (9th Cir.).

(3) Religious Training.

The opposition to war in any form must be by reason of a registrant's religious training and belief. Religious training is a requirement in the conjunctive. Further, it is an objective standard to which the Board may look to determine the sufficiency and good faith of the registrant's belief. If a registrant falls short of his burden, there would be a basis of fact for the Board's classification.

(4) and (5) Character of Registrant, Sincerity and Good Faith Objections.

There are many things on which the Selective Service Board could question the character of the registrant, and the sincerity and good faith of his objections. If any one of these appeared in the Selective Service file, there would be basis in fact for this classification.

Inasmuch as the Board is examining the registrant's belief, anything which would show lack of sincerity or good faith would be a basis in fact for denial of the classification.

POINT TWO.

The Local Board, Upon Personal Appearance, Did Not Deprive the Appellant of a Full and Fair Hearing, nor Was There a Violation of the Appellant's Rights as Guaranteed by the Regulations, the Act, and the Fifth Amendment.

The résumé of the appellant's personal appearance before the Local Board on October 20, 1950, appears in Government's Exhibit No. 1, page 35. There it is noted that the Local Board considered many things among which were the possibility of the registrant's gaining classification as a minister. The Board also asked about the appellant's willingness to serve in a non-combatant capacity, whether or not the appellant would be willing to defend himself or his family. The appellant thus had opportunity to fully state his entire case to the Local Board and did state his case to the Local Board. It appears that *Cox v. United States,* 332 U. S. 442, governs in this particular case.

> "The provision making the decision of the local boards 'final' means to us that Congress chose not to

> give the administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The law presumes that the Local Board has done its duty. *Koch v. United States,* 150 F. 2d 762, and procedural errors or irregularities which do not result in prejudice to the registrant are to be disregarded. *Tyrrell v. United States,* 200 F. 2d 8. Futhermore, the classification anew by the Appeal Board had the effect to cure any defects that may have occurred in the Local Board's personal appearance.

Title 32, Code of Federal Regulations, Section 1626.26, states that when the Local Board reopens the registrant's classification:

> "(a) The Appeal Board shall classify the registrant, giving consideration to the various classes in the same manner in which the Local Board gives consideration thereto when it classifies a registrant, except an Appeal Board may not place a registrant in Class 4-F because of the physical or mental disability, unless the registrant has been found by the Local Board or the Armed Forces to be disqualified for any military service because of physical or mental disability;
>
> (b) Such classification of the registrant shall be final, except where an appeal to the President is taken. . . ."

POINT THREE.

There Is No Denial of Due Process Upon the Personal Appearance of the Appellant Before the Hearing Officer in the Department of Justice Where the Hearing Officer Did Not Disclose the Contents of F.B.I. Investigative Report on the Appellant's Conscientious Objector Claim.

Section 6(j) of the Act, 50 U. S. C., App., Section 456(j) (62 Stat. 609), provides for the hearing of the Department of Justice. *United States v. Nugent,* 346 U. S. 1, is the controlling case here. That case held that it is the duty of the Hearing Officer to give a summary of the adverse information if the appellant asks for such adverse information and if there is such adverse information in its file. Herein the appellant did not ask for the summary of the adverse information. Therefore, it was unnecessary for the Hearing Officer to give him a summary.

It is noted that prior to such a hearing, the Hearing Officer mails to the registrant a notice of hearing and instructions to registrants whose claims for exemption as conscientious objectors had been appealed. These instructions provide in part:

> "2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the Hearing Officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to and tends to defeat the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence."

Since there is no constitutional right to exemption because of religious training and belief, any claim of denial of due process must necessarily then be based upon a variance from the procedure established by Congress or by administrative officials under a proper delegation of power. The evidence in the present case discloses no request by the appellant for adverse information held by the Hearing Officer. Without such a request, there is no duty which can be visited upon the Hearing Officer requiring him to disclose any information, either favorable or adverse to the appellant. It is therefore submitted that no denial of due process can be shown by the failure of the Hearing Officer to disclose any adverse information which may have been contained in the reports of the Federal Bureau of Investigation.

POINT FOUR.

The Trial Court Committed No Error When It Refused to Receive Into Evidence the Federal Bureau of Investigation Investigative Report and Excluded It From Inspection and Use by the Appellant in the Trial of This Case.

The argument discussed previously under Point Three of the Appellee's Brief is herein incorporated in full as if set out here. *United States v. Nugent, supra,* appears to be the controlling case in this regard. The court held such a procedure as occurred in this case was constitutional. It stated that the statutory scheme for review of exemptions claimed by the conscientious objectors does not entitle them to have the investigator's report reproduced for their inspection, on pages 5 and 6 of the opinion. Furthermore, it is within the power of a trial court to exclude irrelevant, immaterial and incompetent evidence.

Procedural irregularities or omissions which do not result in prejudice to the appellant are to be disregarded. *Martin v. United States,* 190 F. 2d 775; *Atkins v. United States,* 204 F. 2d 269.

POINT FIVE.

The Classifications of the Local Board Made in Conformity With the Regulations Are Final if There Is a Basis in Fact for the Decision of the Local Board.

The appellant had opportunity to place a summary of his basis for a claim as a conscientious objector in his SSS Form 150, Form for Conscientious Objector, and the appellant did take advantage of this opportunity. Furthermore, the appellant may at any time mail information into the Local Board and direct that it be placed into his file. The facts appear that the appellant took advantage of this opportunity also. It appears that the appellant was given a reasonable opportunity to submit new information and the Local Board did look at some of the information before it. The regulations do not require that the local draft board consider unlimited information, nor need it allow the registrant unlimited time in its appearance before them. The appropriate section is Title 32, Code of Federal Regulations, Section 1624.2(b):

> "At any such appearance the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked, or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such informa-

tion shall be in writing, or if oral, shall be summarized in writing, and in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. A member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

Furthermore, the law presumes that the Local Board has done its duty, *Koch v. United States,* 150 F. 2d 762, and procedural errors or irregularities which do not result in prejudice to the registrant are to be disregarded.

In *Cox v. United States, supra,* on the point of finality of the Local Board's action, whether or not the decision was erroneous as long as there was a basis in fact for the classification, it does not provide for going into the hearing itself. The summary of the Local Board appearance and action goes in the record. The defendant is limited in his proof to the Selective Service file.

VI.
CONCLUSIONS.

The appellant must convince the Local Board and later the Appeal Board of his right to exemption. The power to classify rests solely in the Selective Service System. Their decision in conformity with regulations is final, even though erroneous.

If there are no such procedural irregularities as would prejudice the right of the registrant, and if there is a basis in fact for the classification given to the registrant, the classification is valid. There is the required basis in

fact in this case. No action of the Local Board or the Appeal Board was arbitrary or capricious.

There was no denial of due process in the classification of the appellant.

There was no error of law in the ruling of the trial court, and therefore, the conviction should be affirmed.

The District Court did not err in denying the motion for acquittal made at the close of all the evidence.

The District Court did not err in denying the motion for a new trial.

The District Court did not err in refusing to allow the Federal Bureau of Investigation's investigative report into evidence.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

MANLEY J. BOWLER,
Assistant United States Attorney,
Chief of Criminal Division;

MANUEL L. REAL,
Assistant United States Attorney,

Attorneys for United States of America,
Appellee.